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4 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN
5 AND FOR THE COUNTY OF SNOHOMISH

6 SNOHOMISH COUNTY, a political
7 subdivision of the State of Washington,

8 Plaintiff,

9 vs.

10 WASHINGTON STATE DEPARTMENT OF
11 ECOLOGY AND TOM FITZSIMMONS, its
12 DIRECTOR,

13 Defendants.

NO.

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF UNDER RCW 7.24

14 **I. NATURE OF THE ACTION**

15 1.1 Pursuant to the Uniform Declaratory Judgments Act, Snohomish County, a political
16 subdivision of the State of Washington, hereby requests declaratory and injunctive relief from
17 the "The Industrial Stormwater General Permit, A National Pollutant Discharge Elimination
18 System and State Waste Discharge General Permit for Stormwater Discharges Associated
19 With Industrial Activities" (hereinafter "Industrial Stormwater General Permit" or "Permit")
20 issued by the Washington State Department of Ecology on August 21, 2002.

21 1.2 The Publication Number for the permit is 02-10-044. A copy of the Permit is
22 attached hereto as Exhibit A.

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24 **II. JURISDICTION AND VENUE**

25 2.1 Plaintiff Snohomish County is a political subdivision of the state of Washington and
26 a discharger of stormwater from industrial facilities in Snohomish County as regulated by State
27 and Federal law.
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2.2 Pursuant to delegation from the Federal government, Defendant Department of Ecology ("DOE") is the agency of the State of Washington which regulates stormwater discharges for nonfederal facilities within and by Snohomish County, and that issued the permit for which review is sought in this matter. Tom Fitzsimmons is the Director of the Department of Ecology.

2.3 This court has jurisdiction over this matter under RCW 7.24 et. seq.

III. CLAIMS

3.1 The Washington State Department of Ecology ("Ecology") erred in issuing the Industrial Stormwater General Permit that requires Snohomish County, and other permittees, to comply with the provisions of the Department's *2001 Stormwater Management Manual for Western Washington*, where such provisions have not been adopted pursuant to rulemaking as required by Chapter 34.05 RCW. As such, the Permit is facially invalid.

3.2 Ecology erred in issuing the Industrial Stormwater General Permit that requires Snohomish County, and other permittees, to comply with later-enacted Total Maximum Daily Loads (TMDLs) for 303(d) Listed Water Bodies and other "control plans," as defined in the Permit, without first invoking the provisions of Section G5, Permit Modification and Revocation. This provision violates the reasonableness standard under which Ecology must operate in regulating the industrial activities of Snohomish County and other permittees under this Permit. Such a requirement is further void for vagueness and violative of due process, both facially and as applied to Snohomish County.

3.3 Ecology erred in establishing the discharge limitation in Section S3(B)(1), setting forth a definition of the term "process wastewater" that is overly broad, unduly burdensome, and violates the rule of reasonableness.

3.4 Ecology erred in prohibiting illicit discharges in Section S3(B)(2), where Ecology defined "illicit discharges" in Appendix 2 of the Permit to mean, "any discharge that is not composed entirely of stormwater except discharges pursuant to a separate NPDES permit and discharges resulting from fire fighting activities." Such a prohibition is overly broad, exceeds

1 Ecology's authority under the Clean Water Act and state law, and violates the rule of
2 reasonableness.

3 **IV. PROCEDURAL HISTORY**

4 **4.1** On October 4, 2000, the Department of Ecology issued the general stormwater
5 permit for industrial activities, which did not expire until November 18, 2005. In establishing
6 the terms of the general permit, Ecology was engaged in implementing the Federal Clean
7 Water Act (CWA), 33 U.S.C. Sections 1251 – 1376, and the Washington State Pollution
8 Control Act, Ch. 90.48 RCW and their accompanying regulations. The 2000 Industrial Permit
9 was reissued without any significant revisions. The reissued permit was appealed in *Puget*
10 *Soundkeeper Alliance et al., v. Department of Ecology and Association of Washington*
11 *Business. PCHB No. 00-174*. The parties to the appeal settled based on an agreed upon
12 process to reissue the permit by July 5, 2002. The permit was issued on August 21, 2002 and
13 is effective on September 20, 2002. The permit expires on September 20, 2007.

14 **V. THE PERMIT**

15 **5.1** Snohomish County is a discharger of stormwater from industrial facilities under
16 State and Federal law.

17 **5.2** The Department of Ecology is the agency of the State of Washington that issued
18 the Permit for which review is sought in this matter.

19 **5.3** The terms and conditions of the Industrial Stormwater General Permit provide
20 coverage for and authorize discharges of stormwater from industrial facilities which would
21 otherwise be prohibited by law. A discharge permit is necessary to meet the requirements of
22 the Clean Water Act for discharges to surface water. The Permit specifically seeks to regulate
23 discharges of stormwater to surface water bodies. In addition to the industrial categories listed
24 in the Permit, permit coverage can be required of any facility discharging stormwater that
25 Ecology determines to be a significant contributor of pollutants to waters of the state.

26 **5.4** The Permit conditions the discharge of stormwater to protect the beneficial uses of
27 the receiving water. Permit conditions include a requirement to have a Stormwater Pollution
28 Prevention Plan (SWPP) and Best Management Practices (BMPs) implemented to eliminate or
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1 minimize the potential to contaminate stormwater at the industrial facility. Treatment of
2 stormwater before discharge may also be required if source control and the so-called "good
3 housekeeping" BMPs fail to adequately protect stormwater from pollutants.

4 **VI. THE PERMIT'S FLAWS**

5 **6.1 Prohibited Discharges.**

6 **6.1.1 Process Wastewater.** The Industrial Stormwater General Permit expressly
7 prohibits, in the absence of coverage under separate permit, the discharge of process
8 wastewater and illicit discharges. "Process wastewater" under the permit means "any water
9 which, during manufacturing or processing comes into direct contact with or results from the
10 production or use of any raw material, intermediate product, finished product, byproduct, or
11 waste product. *Stormwater that commingles with process water becomes process water.*"
12 (Emphasis added). This definition is overly broad, unduly burdensome, and unreasonable
13 because, among other things, the definition would prohibit commingled waters (process water
14 and stormwater) where the commingling is not caused by or under the control of the permittee.
15 Furthermore, the definition would prohibit discharges even where the process water constitutes
16 a minuscule amount of the stormwater discharge. Such an interpretation does not further
17 Ecology's regulatory purpose in preventing the discharge of "pollutants" in stormwater
18 associated with industrial activities. As such, Ecology's "commingling" definition is
19 unreasonable.

20 **6.1.2 Illicit Discharges.** The term "illicit discharge" is defined to mean "any
21 discharge that is not composed entirely of stormwater except discharges pursuant to a
22 separate NPDES permit and discharges resulting from fire fighting activities." The definition is
23 overly broad and exceeds the authority of the Department of Ecology under both the Clean
24 Water Act and State law because it fails to recognize non-stormwater discharges that are not
25 pollutants.

26 For example, the Environmental Protection Agency (EPA) has examined a number
27 of non-stormwater discharges and found no basis for their prohibition. (See, Federal Register,
28 Vol. 65, No. 210, Oct. 30, 2000, pages 64759-64760). Given that the State's purpose in
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1 regulating industrial stormwater discharges is to prohibit "pollutants," and the EPA has
2 recognized that some discharges do not pollute even when comprised of substances other
3 than stormwater, such an overly expansive definition of the term "illicit discharge" violates the
4 reasonableness standard under which Ecology must administer this Permit, and is overly
5 broad.

6 **6.2 TMDLs/Control Plans.**

7 **6.2.1** Permittees are required to comply with any applicable Total Maximum Daily
8 Load (TMDL) determination, or other "control plan", including those enacted after the issuance
9 of the Permit. The development of TMDLs is a process established by Section 303(d) of the
10 Clean Water Act. 33 U.S.C. Section 1313. Federal law requires states to identify sources of
11 pollution in waters that fail to meet state water quality standards, and to develop Water
12 Cleanup Plans to address those pollutants. The Water Cleanup Plan, or TMDL, establishes
13 limits on pollutants that can be discharged to the water body and still allow state standards can
14 be met. No detailed TMDL implementation plans have been developed for non-point sources
15 in Snohomish County to date. For those TMDLs that have been adopted for point-source
16 discharges, none currently apply to Snohomish County. Accordingly, the provisions of the
17 Permit that require compliance with TMDLs or other control plans that may be adopted at
18 some point in the future are void for vagueness because Snohomish County and other
19 similarly situated permittees can only guess at what those plans will require.

20 **6.2.2** Furthermore, given the 30-day appeal provisions of the Industrial Stormwater
21 General Permit, Snohomish County cannot today determine whether it can comply with a later-
22 enacted TMDL or other control plan, or whether any other legal reason might exist to appeal
23 such a TMDL or control plan. Unless the TMDL is added to the permit through the Permit
24 Modification Process set forth in G5 of the Permit, Snohomish County is denied due process of
25 law. The County is required to object now (within 30 days of issuance of the General Permit),
26 and is being subjected to complying with, a condition that may become effective at some later
27 date.
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1 **6.2.3** Finally, requiring the County to comply with later-enacted TMDLs or control
2 plans without the requirement that they become part of the permit through the Permit
3 Modification Process is inherently unreasonable and exceeds the scope of Ecology's authority.
4 Interestingly, the Department of Ecology recognized that this requirement is unreasonable and
5 agreed to implement TMDLs through a permit modification process in its negotiations with
6 Snohomish County and other municipalities on the renewal of the Phase I Municipal
7 Stormwater General Permit.

8 **6.3 Stormwater Management Manual for Western Washington.**

9 **6.3.1** The Permit requires permittees such as Snohomish County to identify and
10 control stormwater pollutant sources from their operations: Dischargers are required to
11 develop and implement technology based BMPs to reduce pollutants in their stormwater.
12 Preparation of a SWPPP is necessary for each facility covered by the permit. The SWPPP
13 must include:

- 14 • An assessment, inventory and description of existing and potential pollutant sources;
- 15 • A description of BMPs selected to for the covered facilities, including the regulation of
- 16 peak flows and volume of stormwater, operational source controls, structural source
- 17 controls, erosion and sediment controls and other BMPs as necessary;
- 18 • A monitoring and reporting plan; and
- 19 • An implementation schedule for the BMPs.

20 Treatment of stormwater before discharge may required if source controls and good
21 housekeeping BMPs don't adequately protect stormwater from pollutants.

22 **6.3.2** A key requirement of the SWPPP is the mandatory use of the standards,
23 conditions and technical provisions of the Department of Ecology's Stormwater Management
24 Manual for Western Washington.

25 **6.3.3** The *Stormwater Management Manual for Western Washington* (hereinafter
26 "Manual"), was developed by Ecology in 1992 in response to a directive of the Puget Sound
27 Water Quality Management Plan. The Department issued an updated version of the Manual in
28 August, 2001. The Manual consists of five volumes and establishes minimum standards and
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1 technical methodologies that must be used to determine surface water runoff and flow rates,
2 and the design, construction and maintenance of facilities. It further establishes source control
3 and treatment BMPs and how they are to be selected, designed, constructed and maintained.

4 **6.3.4** The Manual is a rule within the meaning of RCW 34.05.010(16). Snohomish
5 County wrote a letter to the Department of Ecology in 1996, which is attached hereto as Exhibit
6 B, wherein it asked what steps Ecology had taken to properly adopt the 1992 version of the
7 Manual through the statutory rulemaking process. No written response was received. The
8 Department of Ecology has failed to adopt it pursuant to the statutory rulemaking process. The
9 Manual and the rules contained therein are therefore invalid. *Wash. Independent Tel. Assn. v.*
10 *WUTC*, 110 Wn. App. 147, 39 P.3d 342 (2002). Therefore, the Manual cannot be a lawful
11 permit condition until Ecology engages in rulemaking as required by the Administrative
12 Procedures Act.

13 **VII REQUESTS FOR RELIEF**

14 Based upon the foregoing, Snohomish County respectfully requests that the court grant
15 the following relief which will terminate the controversy:

16 **7.1.** Enter judgment in favor of plaintiff declaring that that Ecology has failed to follow
17 the required rulemaking procedures prior to requiring compliance with the provisions of the
18 Department's *2001 Stormwater Management Manual for Western Washington*, as part of the
19 Industrial Stormwater General Permit, and that the Stormwater Manual is therefore an invalid
20 permit condition and enjoin its applicability to Snohomish County and other covered
21 permittees.

22 **7.2.** Enter judgment in favor of plaintiff declaring that the Permit conditions requiring
23 compliance with later-enacted Total Maximum Daily Loads (TMDLs) for 303(d) Listed Water
24 Bodies and other "control plans," as defined in the Permit are unreasonable as to Snohomish
25 County, void for vagueness, and violate the due process rights of Snohomish County; that the
26 conditions are therefore invalid; and that such requirements can only become permit conditions
27 upon a proper modification of the Permit pursuant to General Condition No. 5.
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1 **7.3** Enjoin the application of a TMDL or other control plan not presently in existence
2 and applicable to Snohomish County absent the Department of Ecology invoking the permit
3 modification process set forth in General Condition G5 of the permit.

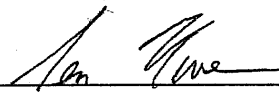
4 **7.4** Enter judgment in favor of plaintiff declaring that the discharge limitation in Section
5 S3(B)(1) of the Permit, setting forth a definition of the term "process wastewater" is
6 unreasonable, overly broad and unduly burdensome and, therefore, invalid as applied to
7 Snohomish County, and enjoin its application to Snohomish County.

8 **7.5** Enter judgment in favor of plaintiff declaring that in prohibiting illicit discharges in
9 Section S3(B)(2) of the Permit, Ecology's definition of the term "illicit discharges" is
10 unreasonable, overly broad and unduly burdensome and, therefore, invalid as applied to
11 Snohomish County and other permittees, and enjoin its application to Snohomish County and
12 other permittees.

13 **7.6** Enter such further relief as the Court finds just and equitable.

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15 Respectfully submitted this 20th day of September, 2002.

16
17 JAMES H. KRIDER
18 Snohomish County Prosecuting Attorney

19 By: 
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